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CHARLES ELMORE CROPLEY
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TRANSCRIPT OF RECORD
IN THREE VOLUMES

IN THE

Supreme Court of the United States

October Term, 1950

No. 509

SUCKOW BORAX MINES CONSOLIDATED, INC., a Corporation; MOJAVE BORAX COMPANY, LTD., a Corporation; PAUL O. TOBELER, Executor of the Last Will and Testament of John K. Suckow, Deceased, and RUTH E. SUCKOW,

Petitioners,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY, AMERICAN POTASH & CHEMICAL CORPORATION, STAUFFER CHEMICAL COMPANY, WEST END CHEMICAL COMPANY, WESTERN BORAX COMPANY, LTD., GOLDFIELDS AMERICAN DEVELOPMENT COMPANY, PACIFIC ALKALI COMPANY, F. LESSER, JAMES M. GERSTLEY, FRANK M. JENIFER, P. C. BAKER, ALLEN W. ASHBURN, WALTER A. MOSES, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION as Executor of the Last Will and Testament of Clarence McAnisse Rasor, Deceased, BEN H. BROWN, as Special Administrator of the Estate of Victor C. Emden, Deceased, et al.,

Respondents.

Volume III
(Pages 677 to 720)

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12158

United States
Court of Appeals
For the Ninth Circuit

SUCKOW BORAX MINES CONSOLIDATED, INC., a Corporation; MOJAVE BORAX COMPANY, LTD., a Corporation; PAUL O. TOBELER, Executor of the Last Will and Testament of John K. Suckow, Deceased, and RUTH E. SUCKOW,

Appellants,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY, AMERICAN POTASH & CHEMICAL CORPORATION, STAUFFER CHEMICAL COMPANY, WEST END CHEMICAL COMPANY, WESTERN BORAX COMPANY, LTD., GOLDFIELDS AMERICAN DEVELOPMENT COMPANY, PACIFIC ALKALI COMPANY, F. LESSER, JAMES M. GERSTLEY, FRANK M. JENIFER, P. C. BAKER, ALLEN W. ASHBURN, WALTER A. MOSES, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION as Executor of the Last Will and Testament of Clarence McAnisse Rasor, Deceased, BEN H. BROWN, as Special Administrator of the Estate of Victor C. Emden, Deceased, et al.,

Appellees.

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

**Proceedings Had in the United States Court of Appeals
for the Ninth Circuit**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, October 24, 1949.

Before: Healy, Bone and Pope,
Circuit Judges.

ORDER OF SUBMISSION, ETC.

On motion of Mr. Vincent O'Donnell, counsel for appellees, Ordered leave granted to file stipulation amplifying transcript of record.

Further Ordered appeal herein argued by Messrs. Sterling Carr, Thurman Arnold and Frank Buren, counsel for appellants, and by Messrs. Moses Lasky and John W. Burns, counsel for appellees, and submitted to the court for consideration and decision.

In the United States Court of Appeals
for the Ninth Circuit

No. 12,158

SUCKOW BORAX MINES CONSOLIDATED, INC., a Corporation, et al.,

Appellants,

vs.

BORAX CONSOLIDATED, LTD., a Corporation, et al.,

Appellees.

STIPULATION AMPLIFYING TRANSCRIPT OF RECORD

It Is Hereby Stipulated by and between Suckow Borax Mines Consolidated, Inc., a corporation, Mojave Borax, Ltd., a corporation, Paul A. Tobeler, executor of the last will and testament of John K. Suckow, deceased, and Ruth E. Suckow, Appellants, and Stauffer Chemical Company, a corporation, one of the Appellees, that said Stauffer Chemical Company filed with the District Court in the proceeding from which this appeal is taken, on or about the 3rd day of February, 1948, a pleading entitled "Motions and Notice of Motions of Defendant, Stauffer Chemical Company to Dismiss for Failure to State a Claim upon which Relief may be Granted, to Dismiss Because the Action is Barred by the Statute of Limitations, for a Summary Judgment, and to Strike." A copy of said Notice of Motions is attached hereto, marked

Exhibit A, and is by this reference incorporated herein and made a part hereof.

It Is Further Stipulated by the aforesaid parties that said Notice of Motions of Stauffer Chemical Company shall be treated for all purposes connected with this appeal as part of the Transcript of Record before this court with the same effect as if it were reproduced in said Transcript.

Dated: October 25, 1949.

/s/ THURMAN ARNOLD, S.C.

/s/ FRANK BUREN, S.C.

/s/ STERLING CARR,

Attorneys for Suckow Borax Mines Consolidated, Inc., Majave Borax Ltd., Paul A. Tobeler, executor of the last will and testament of John K. Suckow, deceased, and Ruth E. Suckow, Appellants.

/s/ VINCENT H. O'DONNELL,
Attorney for Stauffer
Chemical Co., Appellee.

EXHIBIT A

In the District Court of the United States for the Northern District of California, Southern Division

No. 27646-R

SUCKOW BORAX MINES CONSOLIDATED, INC., a Corporation; MOJAVE BORAX COMPANY, LTD., a Corporation; PAUL O. TOBELER, Executor of the Last Will and Testament of JOHN K. SUCKOW, Deceased, and RUTH E. SUCKOW,

Plaintiffs,

vs.

BORAX CONSOLIDATED, LTD., a Corporation, et al.,

Defendants.

MOTIONS AND NOTICE OF MOTIONS OF DEFENDANT, STAUFFER CHEMICAL COMPANY, TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED, TO DISMISS BECAUSE THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS, FOR A SUMMARY JUDGMENT, AND TO STRIKE

To Suckow Borax Mines Consolidated, Inc., Mojave Borax Company, Ltd., Paul O. Tobeler, Executor of the Last Will and Testament of John K. Suckow, Deceased, Ruth E. Suckow, Plaintiffs herein, and to Thurman W. Arnold,

Esq., and Sterling Carr, Esq., Attorneys for Plaintiffs:

Please Take Notice, that on Monday, the 16th day of February, 1948, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, in the courtroom of the above-entitled court, before the Honorable Michael J. Roche, District Judge, in the Post Office Building in the City and County of San Francisco, State of California, defendant, Stauffer Chemical Company, will at said time and place move, and hereby moves, the court as follows:

I.

To Dismiss the action with respect to the claim asserted by each plaintiff as against the moving defendant on the ground that the complaint fails to state a claim on which relief can be granted to said plaintiff against said defendant; said motion hereby is made, and will at said time be made, severally as respects each plaintiff and the moving defendant.

II.

To Dismiss the action as against the moving defendant and as respects the claim of each of the plaintiffs on the following grounds:

1. The action on behalf of each of said plaintiffs is barred by the Statute of Limitations.

2. The action on behalf of each of said plaintiffs is barred by the provisions of Subdivision (1) of Section 338 of the California Code of Civil Procedure.

3. The action on behalf of each of said plaintiffs is barred by the provisions of Subdivision (4) of Section 338 of the California Code of Civil Procedure.

4. The rights of action set forth in the complaint on behalf of each of said plaintiffs did not accrue within three years next before the commencement of the action but accrued, if at all, prior to said three years and are therefore barred by the Statute of Limitations.

5. The rights of action set forth in the complaint on behalf of each of said plaintiffs did not accrue on or after October 11, 1943, but accrued, if at all, prior to said date and are therefore barred by the Statute of Limitations.

6. The rights of action set forth in the complaint on behalf of said plaintiffs did not accrue on or after December 21, 1940, but accrued, if at all, prior to said date and are therefore barred by the Statute of Limitations.

Said motion hereby is made, and will at said time be made, severally as respects each plaintiff and the moving defendant.

III.

In the alternative, and in the event that none of the foregoing motions is granted with respect to each plaintiff, To Dismiss as against the moving defendant each of the claims for relief and causes of action asserted by the plaintiffs in paragraphs

79, 80, and 82 to 94, inclusive, and each of said paragraphs, on the following grounds:

1. Said claims for relief and causes of action are barred by the Statute of Limitations.

2. Said claims for relief and causes of action are barred by the provisions of Subdivision (1) of Section 338 of the California Code of Civil Procedure.

3. Said claims for relief and causes of action are barred by the provisions of Subdivision (4) of Section 338 of the California Code of Civil Procedure.

4. The rights of action set forth in said portions of the complaint on behalf of plaintiffs did not accrue within three years next before the commencement of the action but accrued, if at all, prior to said three years and are therefore barred by the Statute of Limitations.

5. The rights of action set forth in said portions of the complaint on behalf of said plaintiffs did not accrue on or after October 11, 1943, but accrued, if at all, prior to said date and are therefore barred by the Statute of Limitations.

6. The rights of action set forth in said portions of the complaint on behalf of said plaintiffs did not accrue on or after December 21, 1940, but accrued, if at all, prior to said date and are therefore barred by the Statute of Limitations.

Said motion hereby is made, and will be made

at said time, severally as respects each plaintiff and the moving defendant.

IV.

In the alternative, and in the event that none of the foregoing motions is granted with respect to each plaintiff, the defendant moves, and will move said court at said time, To Grant a Summary Judgment in favor of the moving defendant as against each plaintiff on the ground that there is no genuine issue as to any material fact, and that the moving defendant is entitled to a judgment as a matter of law.

V.

In the alternative, the moving defendant moves, and will move at said time, To Strike from the complaint the following allegations on the ground that they are, and each of them is, redundant, immaterial and impertinent matter, to wit:

1. All the allegations of paragraphs 79 to 94, inclusive, and severally each and every one of the allegations contained in said paragraphs.

2. The words in subdivision (b) of paragraph 83, at lines 10 and 11 on page 43, "and by chicane and false testimony and by other devious means."

3. All of subdivision (c) of paragraph 83 down to, but not including, the words in lines 28 and 29 on page 45 reading, "on March 2, 1933, said Suckow Company was formally adjudged a bankrupt."

4. The words "Through false and fraudulent

testimony" in line 22 on page 45 in subdivision (c) of paragraph 83.

5. All of subdivision (d) in paragraph 83 down to, but not including, the words in lines 29 and 30 on page 46, reading, "that on or about the 17th day of April, 1934, and after court proceedings to such end, a lease was granted * * *"

6. In subdivision (f) of paragraph 83 the first thirteen words reading, "Meanwhile, and in order further to harass said Suckow and said Suckow Company," and the words, "said action was commenced with the idea of taking whatever action might be possible to complicate matters further for said Suckow and Suckow Company," in lines 6 to 8 on page 48.

7. All of subsection 8 of subdivision (g) of paragraph 83.

Each of the foregoing motions is made, and will be made at said time, and will be based on all the pleadings and papers on file herein, including the foregoing motions, this notice of motion, and upon the following documents:

1. The affidavit of Allen W. Ashburn executed January 15, 1948, which accompanies and was filed with a notice of motion similar to this filed by Borax Consolidated, Ltd., et al., in the above-entitled proceeding and noticed for hearing in the above-entitled court on February 16, 1948, and to which is attached copy of affidavit of John K. Suckow presented on January 13, 1930, "In the

Matter of the Application of Borax Consolidated, Ltd., a corporation, for Subpoena for Attendance of John K. Suckow Upon Taking His Deposition in the Case of Borax Consolidated, Ltd., a corporation, Plaintiff, vs. John K. Suckow, et al., Defendants, Now Pending in the Superior Court of the State of California, in and for the County of Kern, and No. 20,694 on the Records Thereof," being Misc. No. 1469 in the records of the Superior Court of the State of California, in and for the County of Los Angeles.

2. The affidavit of Albert H. Bargion, executed January 21, 1948, which accompanies and was filed with a notice of motion similar to this filed by Borax Consolidated, Ltd., et al., in the above-entitled proceedings and noticed for hearing in the above-entitled court on February 16, 1948.

3. The affidavit of Moses Lasky, executed February 2, 1948, and the documents attached thereto, which accompanies and was filed with a notice of motion similar to this filed by Borax Consolidated, Ltd., et al., in the above-entitled proceedings and noticed for hearing in the above-entitled court on February 16, 1948.

Each of said affidavits is by reference incorporated herein and made a part hereof.

Dated: San Francisco, February 2, 1948.

/s/ VINCENT H. O'DONNELL,
Attorney for Defendant,
Stauffer Chemical Co.

Receipt of a copy of the foregoing hereby is acknowledged this 2nd day of February, 1948.

/s/ THURMAN W. ARNOLD,

/s/ STERLING CARR,
Attorneys for Plaintiffs.

[Endorsed]: Filed October 25, 1949.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday, October 26, 1950.

Before: Healy, Bone and Pope,
Circuit Judges.

ORDER DIRECTING FILING AND OPINION AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

In the United States Court of Appeals
for the Ninth Circuit
No. 12,158

SUCKOW BORAX MINES CONSOLIDATED, INC., a Corporation; MOJAVE BORAX COMPANY, LTD., a Corporation; PAUL O. TOBELER, Executor of the Last Will and Testament of John K. Suckow, Deceased, and RUTH E. SUCKOW,

Appellants,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY, AMERICAN POTASH & CHEMICAL CORPORATION, STAUFFER CHEMICAL COMPANY, WEST END CHEMICAL COMPANY, JAMES M. GERSTLEY, FRANK M. JENIFER, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Executor of the Last Will and Testament of Clarence McAnisse Rasor, Deceased,

Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division

October 26, 1950

Before: Healy, Bone and Pope,
Circuit Judges.
Bone, Circuit Judge.

OPINION

This action was commenced by the four appellants[1] on September 11, 1947. It is a suit for treble damages brought under the antitrust laws of the United States (15 U.S.C.A. § 15), involves the borax industry, and is based on the claim that appellees[2] conspired together and drove appellants out of business by wrongful and illegal acts, all of

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[1]Appellants (plaintiffs below) are Suckow Borax Mines Consolidated, Inc., a Delaware corporation (hereinafter referred to as Suckow Co.); Mojave Borax Co., Ltd., a Nevada corporation (hereinafter referred to as Mojave); Paul O. Tobeler, executor of the estate of John K. Suckow, deceased, and Ruth E. Suckow, who is the widow of John K. Suckow.

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[2]Appellees are Borax Consolidated Ltd. (hereinafter referred to as Borax Ltd.), a British corporation; Pacific Coast Borax Company (hereinafter referred to as Pacific Coast), a Nevada corporation owned by Borax Ltd.; United States Borax Company (hereinafter referred to as U. S. Borax), a West Virginia corporation owned by Borax Ltd.; American Potash and Chemical Corporation (hereinafter referred to as American Potash), a Delaware corporation; Stauffer Chemical Company (hereinafter referred to as Stauffer Co.), a California corporation; West End Chemical Company (hereinafter referred to as West End Co.); James M. Gerstley; Frank M. Jenifer and Bank of America National Trust and Savings Association as executor of the estate of Clarence M. Rasor (all of the individual defendants being officers or agents of the corporate defendants or some of them). Other corporate and individual defendants were named in the complaint but six were never served and two were dismissed for lack of venue.

which damaged appellants in the sum of $5,000,000. The prayer of the complaint is for a recovery of three times this amount. The case is here on appeal from the order of the trial court dismissing appellant's second amended complaint and from the denial of a motion to amend the said order so as to permit the filing of a third amended complaint.[3]

The Complaint

The complaint (in 95 lengthy paragraphs, which occupy 77 pages of the appeal record) recites a history of the development of the borax industry, and charges that since 1929, and many years prior thereto and continuing up until approximately 1945, the defendants conspired to, and did, monopolize and control the mining, production, processing, manufacture distribution, trade and sale of the world's supply of crude borates, refined borax, and boric acid. This monopoly, it is charged, was achieved by a combination and conspiracy to restrain trade and commerce in violation of the antitrust laws, and pursuant to the terms of a continuing conspiracy (which appellants call the "General

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[3]The opinion of the trial court is reported in 81 F. Supp. 301. Reference to Burnham Chemical Co. v. Borax Consolidated Ltd., 9 Cir., 170 F.2d 569, cert denied 336 U.S. 924, rehearing denied 336 U.S. 955, may be helpful, for in many respects the charges in the complaint and the legal and procedural issues in that case closely parallel those in the instant case. The conspiracy referred to in the Burham case is the same one upon which this action was brought and most of the defendants in this case were defendants there.

Conspiracy") which resulted from an agreement entered into on November 27, 1929, between appellees.

We here endeavor to summarize the essential and controlling averments of this long complaint.

Under this 1929 agreement appellees became members of a conspiracy having for its purpose the creation and perpetuation of a monopoly of the entire borax industry. This was to be accomplished by purchase or lease of approximately 95% of the world's known deposits of borate minerals (including 100% of the known sodium borate deposits—sodium borates are found in purer form than other borate minerals, and hence are more economical to refine) and approximately 90% of the world's known lake brines from which borax may be extracted; by allocation of production and refining of borax; by allocation of markets, trade areas and classes of consumers; by agreements to fix arbitrary and non-competitive prices, resale prices, freights, discounts, permitted use, and conditions of sale of crude borates, refined borax and boric acid; by blacklisting consumers who dealt with other producers, and by the elimination and destruction, through purchase or otherwise, of all competitors of the defendants, including John K. Suckow and his interests, plaintiffs herein.

It is charged that this 1929 "agreement" was renewable annually; that it was subsequently extended and modified, and, as modified, remained in effect until some time in 1944. The remainder of the complaint is concerned with a history of the

various and devious methods and plans employed by defendants to bring John Suckow to his knees and it portrays a series of oppressive and coercive acts directed against appellants.

John Suckow, a medical practitioner, fortuitiously discovered a vein of borate ore in 1912 while drilling for water upon his farm in the Mojave desert in California. Shortly thereafter Suckow, not knowing its true worth, sold his interest in a portion of the land to agents of U. S. Borax for a nominal sum. In ensuing years Suckow attempted to develop the borate deposits on the remaining portion of the land owned by him, and on another section of land upon which he had meanwhile filed patents. These development attempts were opposed by various of appellees herein by means of claim-jumping, forced sales, employment of undisclosed agents, and other tactics. In 1926 Suckow discovered a rich and deep deposit of sodium borate ore on a section of land then owned jointly by Suckow and Pacific Coast. (It is alleged that Pacific Coast had no rightful interest in this land.) From that time on he was harassed by a series of law suits and foundless claims brought by Borax Ltd. and its subsidiaries and agents.

In 1929 Suckow formed the Suckow Co. and transferred all of his borax interests to said corporation. During that same year he succeeded in negotiating a contract with Gembo, a Dutch corporation, for the marketing and sale of borax mined and processed by Suckow Co. When defendants learned that despite their carefully drawn schemes

for controlling the markets Suckow had found an outlet for his products they renewed their efforts to force him to sell out or to terminate his operations. In an equity action for an accounting, Borax Ltd. persuaded the court (in 1932) that the value of the ore was $21.89 per ton. Suckow was compelled to pay to Borax Ltd. one-half of that amount for every ton of ore removed; this forced him to cease operations (in or about 1933). In a bankruptcy proceeding brought at approximately the same time agents and attorneys of Borax Ltd. succeeded in convincing the bankruptcy court that the value of Suckow's ore was only $2.50 per ton.

Various other suits were filed by some of the appellees. On March 2, 1933, Suckow Co. was adjudged a bankrupt but only after Borax Ltd. or its agents had, by the use of false testimony and fictitious claims, caused the bankruptcy referee to scale down the value of the assets of Suckow Co. to a fraction of their true value and build up the amount of its liabilities by including non-existent claims (one of which was a purported claim of Dr. Suckow himself for $76,922 which he insisted was not owed and never had been owed to him by the Suckow Co.).

On April 17, 1934, the trustee in bankruptcy leased the interest of the Suckow Co. in the calcining plant to Pacific Coast for a period of five years.

On August 18, 1934, three different proceedings or orders, which had been brought or instigated by defendants, were pending against Suckow or

Suckow Co. in the trial court, and five which had been decided adversely to him were pending on appeal. On that date Suckow and his wife Ruth entered into a settlement agreement with Pacific Coast wherein it was agreed that the Suckows and/or Suckow Co. would convey certain property to Pacific Coast, would execute, together with the trustee, a more favorable lease of the mine to Pacific Coast (for a ten year period) and would dismiss all of the appeals and release all possible claims against Pacific Coast Borax Ltd., and U. S. Borax. In return Pacific Coast agreed to dismiss certain actions against Suckow and Suckow Co., file satisfactions of certain judgments, execute or obtain certain releases, and pay Suckow the sum of $150,000. The conditions of this settlement agreement of August 18, 1934, were fulfilled by all parties.

It is alleged that Suckow would not have entered into the said settlement agreement but for his desperate financial condition which had been caused by defendants' schemes and activities and but for his complete ignorance of the existence of the illegal "General Conspiracy."

In 1938 the royalties from the lease had paid off all of the bankruptcy creditors and the expenses of administration. In consequence the bankruptcy proceedings of Suckow Co. were terminated and the property in the hands of the trustee was returned to the Suckow Co. This consisted primarily of an undivided one-half interest in the reversion of the mine property, and in a right to royalties upon one-half of the ore extracted by the lessee, Pacific Coast.

In December of 1942 Suckow Co. entered into an agreement with Pacific Coast whereby the Suckow Co., for the sum of $350,000 in cash, sold to Pacific Coast all of its interest in the borax property, real and personal, and released Pacific Coast and Borax Ltd. from all claims, demands, and causes of action.

It is alleged that the officers of the Suckow Co. entered into this 1942 agreement and sale only because they were discouraged by the continued harassment by defendants. Specifically, lessee Pacific Coast had substantially impaired future mining and production of ore by inefficient and unminer-like methods of mining and by causing, through negligence or design, cave-ins which blocked access to productive areas of the mine, threatened to totally exhaust the ore and refuse to deliver possession of the mine and equipment to Suckow Co. upon the termination of the lease. Appellees threatened further prospective legal entanglements with which Suckow Co. feared it would be unable to cope. Also appellees had by then taken over all of Suckow's former customers and markets.

All of the aforesaid acts were done in pursuance of the said "General Conspiracy," and in order to control the world borax market and destroy appellants' business and competitive activities. The "General Conspiracy" was a continuing conspiracy and plaintiffs had no knowledge of its existence until about September, 1944, at which time the United States Government secured and filed an indictment against appellees, or some of them, for violation of the antitrust laws of the United States.

Appellants would not have entered into the 1934 and 1942 agreements had they known of the existence of this conspiracy.

Finally, it is alleged that these acts of appellees damaged appellants in the sum of $5,000,000 and they are entitled to recover three times the amount of such damages, with costs and attorneys' fees. Judgment for $15,000,000 is demanded.

Appellees' Motion to Dismiss and for Summary Judgment

Without answering the complaint appellees moved to dismiss the action upon the grounds that the complaint failed to state a claim upon which relief could be granted and that the action was barred by the California statute of limitations. In the alternative appellees moved for a summary judgment on the ground that there was no genuine issue as to any material fact and that appellees were entitled to judgment as a matter of law.

Appellees' motions were supported by three affidavits and documents attached thereto. The purpose of these affidavits and documents was to show appellants' prior knowledge or belief in the existence of the aforesaid conspiracy and to present the various releases referred to in the complaint.

A brief summary of these documents is necessary to an understanding of this case. Their recitals fill several hundred pages of the printed record on appeal.

The affidavit of Judge Allen W. Ashburn (who had previously been an attorney for Borax Ltd.)

was employed as a means of introducing a copy of an affidavit of Dr. Suckow which had been served on Ashburn in 1930 in connection with an action then pending between Borax Ltd. and Suckow. Suckow, in the aforesaid affidavit (of December 6, 1930) accused Borax Ltd. and its subsidiaries of attempting to control and curtail world production of crude borax and to eliminate competition, and alleged on information and belief that a sharp rise in borax prices which occurred subsequent to December, 1929, "is directly due to some agreement between producers of crude borax and said Borax Consolidated Ltd., and its said subsidiaries known aforesaid as the 'Borax Trust.'"

The affidavit of Albert H. Bargion, who was the official reporter at hearings held before the United States District Court in 1932 and 1933 in actions between Borax Ltd. and Suckow Co. was employed to introduce a transcript of certain statements made to the court in the course of those hearings by the attorneys for Suckow Co. These statements included allegations that the actions brought by Borax Ltd. were part of a plan to throttle competition and to create an unlawful monopoly in restraint of trade; that the suits were filed to force Suckow to sell out or to put him out of business, "so that they can control all the borax there is in the world."

The third affidavit filed in support of the motions was that of Moses Lasky, one of appellees' counsel in this action. It was presented and employed as a vehicle for the introduction of attached certified copies of pleadings and portions of transcripts from

prior court proceedings between Borax Ltd. and Suckow Co., and a transcript of testimony given at a Senate Committee hearing, in all of which transcripts appellants or their attorneys had alleged (at various times from 1930 to 1934) that Borax Ltd. and its subsidiaries were trying to close down the Suckow mine pursuant to a plan to prevent Suckow from producing any ore in order to perfect and maintain a worldwide monopoly of the borax industry, and that the various law suits were pursuant to and a part of a conspiracy to restrain interstate and foreign trade by the elimination of competitors and by price fixing and otherwise, in violation of antitrust laws.

Also introduced by and attached to the Lasky affidavit were photostatic copies of: general releases executed in 1934 by Dr. and Mrs. Suckow, Suckow Co. and Mojave in favor of Borax Ltd., Pacific Coast and U. S. Borax;[4] an agreement entered into

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[4]These releases were denominated "General Release of all Claims," and the following extracts will illustrate the breadth of coverage intended to be given. The named corporations were released and forever discharged from "any and all actions and causes of action, claims and demands whatsoever, whether or not well founded in fact or in law, and of and from any and all and all manner of suits, debts, dues, sums of money, accounts reckonings, bonds, bills, specialties, covenants, controversies, agreements, promises, trespasses, damages, judgments, executions, claims and demands whatsoever in law or in equity which * * * the undersigned has had or now has or which it or its successors * * * hereafter can, shall or may have for, upon or by reason of any matter, cause or thing what-

in 1934 between Dr. and Mrs. Suckow and Pacific Coast; a general release executed in 1942 by Suckow Co. in favor of Borax Ltd. and Pacific Coast[5] a letter from a title insurance company (the escrow holder) showing the date of delivery of the 1942 release; stockholders' (of Suckow Co. and Mojave) authorizations for the agreements, sales and releases; a certified copy of a deed executed by Suckow Co. on December 21, 1942, and recorded on December 29, 1942, conveying all of its property in Kern County, California, to the grantee, Borax Ltd. Affiant declared that the originals of the photostatic

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soever, whether herein specifically mentioned or otherwise, from the beginning of the world to the date of these presents; and full satisfaction of all of said claims * * * [etc.] is hereby acknowledged.

"It is the specific intent and purpose hereof to release and discharge any and all claims and causes of action of any kind or nature whatsoever, whether known or unknown and whether specifically mentioned herein or not, which may exist or might be claimed to exist at or prior to the date hereof, and the undersigned specifically waives any right or claim of right to hereafter assert that any cause of action or alleged cause of action or claim or demand of any nature or kind whatsoever has been, through oversight or error or intentionally or unintentionally, omitted from this release."

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[5]In addition to the language quoted in footnote 4, the 1942 release "Without limiting the generality of the foregoing release," specifically granted release from any claims arising out of damage or injury to the mine caused by the lessee, "and for any other act of commission or omission in or pertaining to the use or occupation of the said leased premises."

copies were in his possession and would be produced if the genuineness of the copies was questioned.

Appellant filed three affidavits in opposition to the motions. The affidavit of Paul Toebler, who as Dr. Suckow's executor is one of the appellants, was introduced primarily to show (through copies of letters and telegrams attached to the affidavit) the existence of the conspiracy alleged in the complaint; not to disprove the genuineness of the facts and documents shown by appellees' affidavits. The allegations in Toebler's affidavit were based on information and belief contrary to Rule 56 (e) and accordingly appellees objected to the introduction of this affidavit.

The documents which were attached as exhibits to Toebler's affidavit were not original copies nor certified copies nor was any competent proof offered as to their authenticity. However, appellees specifically stated that they would not object to two of them, namely, a pleading in a former action in which Borax Ltd. had denied that it had any monopoly or that it had harassed or threatened Suckow, and a letter from Borax Ltd.'s attorney to the trial judge in the bankruptcy case in which substantially the same denials were made.

Frank Buren, one of appellants' attorneys in this action (he had also represented them extensively in prior actions and was formerly the secretary of Suckow Co.) filed two affidavits in opposition to appellees' motions. He averred that the statements concerning the existence of a conspiracy which had been made by him in former actions (which state-

ments had been introduced by appellees' affidavits) only related to the conspiracies involved in those particular law suits and not to the 1929 "General Conspiracy"; that, although he and Suckow believed that Borax Ltd. and its subsidiaries were trying to control the borax industry, they had absolutely no knowledge or suspicion that Am. Potash or the Stauffer Co. were parties to the conspiracy; that they did not know of the existence of the 1929 conspiracy and had no proof or evidence (at the time the statements were made) of the existence of the conspiracy. Buren also averred that from his long and close association with Suckow he had personal knowledge that Suckow would not have entered into the 1934 agreements but for his extreme financial difficulties occasioned by the harassing tactics of appellees.

Upon this state of the record the trial court granted appellees' motions and entered judgment dismissing the complaint with prejudice, from which judgment this appeal was taken. It will be seen that several issues of law are presented, some of which by their nature are procedural; others substantive. We will first consider the procedural issues. The pertinent language of the rules of civil procedure which are invoked is set forth in the margin.[6]

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[6]Rule 8 (c), "In pleading to a preceding pleading, a party shall set forth affirmatively * * * release, res judicata, * * * statute of limitations, * * * and any other matter constituting an avoidance or affirmative defense."

Rule 9 (f), "For the purpose of testing the sufficiency of a pleading, averments of time and place

THE PROCEDURAL ISSUES

Appellants contend that the affirmative defenses of release and statute of limitations cannot be raised on a motion to dismiss but must, according to the terms of Rules 8 (c) and 12 (b), be asserted in an

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are material and shall be considered like all other averments of material matter."

Rule 12 (b), "Every defense, in law or fact, to a claim for relief in any pleading * * * shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted. * * * A motion making any of these defenses shall be made before pleading if a further pleading is permitted. * * * If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Rule 56 (b), "A party [defendant] against whom a claim * * * is asserted * * * may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. (c) * * * The adverse party * * * may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

answer. We do not agree. In the first place a complaint may properly be dismissed on motion for failure to state a claim when the allegations in the complaint affirmatively show that the complaint is barred by the applicable statute of limitations. This is so because Rule 9 (f) makes averments of time and place material for the purposes of testing the sufficiency of a complaint. Illustrative of this principle are Berry v. Chrysler Corp., 6 Cir., 150 F. 2d 1002, Kithcart v. Metropolitan Life Ins. Co., 8 Cir., 150 F. 2d 997, cert. denied 326 U. S. 777; Panhandle Eastern Pipeline Co. v. Parish, 10 Cir., 168 F. 2d 238; Gossard v. Gossard, 10 Cir., 149 F. 2d 111. See also 2 Moore's Fed. Prac. (2nd ed) §§ 8.28 (p. 1698); 9.07 (p. 1920); 12.08 (p. 2244); 12.10 (p. 2257). Also 1 Barron & Holtzoff, Fed. Prac. and Proc. §§281 and 349.

Secondly, affirmative defenses, even though not appearing on the face of the complaint, may be established upon motion to dismiss or for summary judgment when, by affidavits, depositions and admissions, a set of undisputed facts is revealed upon which the moving party is entitled to judgment as a matter of law. Clearly Rule 56 permits affirmative defenses to be raised in a motion for summary judgment. Gifford v. Travelers Protective Ass'n., 9 Cir., 153 F. 2d 209; Kithcart v. Metropolitan Life Ins. Co., supra; Nahtel Corp. v. W. Va. Pulp & Paper Co., 2 Cir., 141 F. 2d 1; Altman v. Curtiss-Wright Corp., 2 Cir., 124 F. 2d 177. And the amendment to Rule 12 (b) (see footnote 7, infra) requires a motion to dismiss (for failure to state a claim)

to be treated as a motion for summary judgment if matters outside the pleadings are presented to, and are not excluded by, the court. Butcher v. United Elec. Coal Co., 7 Cir., 174 F. 2d 1003. Thus, the effect of the amendment is to permit one who moves to dismiss for failure of his adversary to state a claim, to show that under a set of facts which are undisputed, he is entitled to judgment as a matter of law. See 2 Moore's Fed. Prac. (2nd ed.) §§ 8.28 (p. 1698), 12.09 (p. 2255). In short, the motion to dismiss is thereby converted into a motion for summary judgment. See Advisory Committee's note to Rule 12 (b), as amended; Kelly Co. v. R. F. C., 2 Cir., 172 F. 2d 865.[7]

We note that appellees' motions were to dismiss the complaint, or in the alternative, for summary judgment. Although the trial court "dismissed the complaint," we shall, in light of the above discussion, treat this disposal as a summary judgment in

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[7]The complaint in the instant case was filed on September 11, 1947, prior to the effective date of the amendments to the Rules, March 19, 1948. However, the amended Rules govern this proceeding which was then "pending"; there is no contention that their application would not be feasible or would work injustice. See Rule 86; Latta v. Western Inv. Co., 9 Cir., 173 F.2d 99. In any event the problem is unimportant because even prior to the amendment of Rule 12 (b) a motion to dismiss accompanied by admissible matters outside the pleadings was treated by the courts as a "speaking motion" and equivalent to a motion for summary judgment. Latta v. Western Inv. Co. (supra, this note) and cases cited in footnote 1 thereof; Kithcart v. Metropolitan Life Ins. Co., 8 Cir., 150 F.2d 997.

favor of appellees. Kelly v. R. F. C., supra. The net effect was the same—an adjudication on the merits, Rule 41 (b). We accordingly hold that the affirmative defenses of release and statute of limitations were properly raised and presented by the procedure employed by appellees.

Appellants' next contention is that appellees, by filing their motions, admitted all of the well-pleaded allegations of fact in the complaint, and that the affidavits filed by appellees in support of the motion cannot be used to contradict such allegations in the complaint. Generally speaking, this is a correct statement of the law. Rule 56 was not designed to permit a trial of real and genuinely contested issues of fact by affidavit. Sartor v. Arkansas Gas Corp., 321 U. S. 620. But when a general statement in a pleading is shown by specific facts stated in controverting affidavits, depositions and admissions, to be untrue, and the facts so presented are not denied and are not of such nature as to be peculiarly within the knowledge of the affiant, then no "genuine" issue remains for the trier of the facts. Koepke v. Fontecchio, 9 Cir., 177 F. 2d 125, 127; Lindsey v. Leavey, 9 Cir., 149 F. 2d 899; Piantadosi v. Loew's Inc., 9 Cir., 137 F. 2d 534. See also Latta v. Western Inv. Co., 9 Cir., 173 F. 2d 99, where (as in the instant case) an allegation in the complaint concerning lack of knowledge was disproved by affidavits setting forth records in prior actions. The whole purpose of the summary judgment rule is to separate real and genuine issues from mere formal or pretended issues. 3 Moore's Fed. Prac. § 56.01, p. 3174, et seq.

The only factual allegations in the complaint which appellees' affidavits purported to contradict were the allegations that appellants had no "knowledge, intimation or cause to believe" (prior to 1944) that a conspiracy among appellees existed, or knowledge that by such conspiracy appellees planned and engineered the financial destruction of Suckow. Appellees' affidavits showed beyond dispute that for many years (as indicated above) Suckow and his attorneys had repeatedly accused certain of appellees, both in and out of court, of violating the antitrust laws for the specific purpose of damaging Suckow and driving him out of business in order to effect and perpetuate these appellees' worldwide monopoly of the borax industry. Appellants' opposing affidavits did not attempt to refute these statements but merely explained that Suckow had no knowledge of the particular "General Conspiracy," of the year in which it was formed, or of the participation by all of the conspirators, and had no "proof" of the existence of any illegal conspiracy.

To what extent Suckow's knowledge of the particular "General Conspiracy" was material will be considered below. In any event we think it abundantly clear that the record shows that by 1934 Suckow knew he was being grievously damaged by acts of appellees, or some of them, and that at that time he believed, and charged, that these acts, which damaged him or his company, also violated the antitrust laws. A mere general allegation in the complaint to the contrary would not be sufficient to create a "genuine" issue of fact. This view finds

support in other allegations set forth in the complaint to the effect that appellants would not have entered into the 1942 agreement and sale or have given the aforesaid releases, but for appellants' past experience of continued persecutions by appellees, loss of markets through the past activities of appellees, and threats that appellees would renew their harassing tactics. Such allegations are inconsistent with appellants' general denial of any knowledge, belief or suspicion of the existence of a conspiracy to damage them.

The Substantive Issues

Next we consider whether or not the undisputed facts shown by the pleadings and affidavits entitled appellees to a judgment as a matter of law.

Appellants frankly concede that in this action they do not attempt to set aside (on the basis of fraud or otherwise) the releases executed by them in 1934 and 1942, but contend that the said releases, or the procurement of them by the appellees, were "overt acts" in furtherance of a continuing conspiracy. This argument is difficult to understand. The releases were formally executed by appellants, and the record shows that in exchange for the 1934 agreement and releases appellants received $150,000 in cash and the satisfaction or release of various judgments and claims against them which amounted to about $500,000. The complaint itself shows that in exchange for the 1942 sale and release executed by appellants they received $350,000 in cash. We think that the trial court was entirely justified in

finding that, "In every transaction with the defendants the plaintiffs have received consideration or an adjudication of their rights by a court having jurisdiction."

Appellants contend that these releases do not bar this action for the reason that they did not know of the existence of the cause of action at the time the releases were executed, and would not have executed them had they known of the existence of the 1929 "General Conspiracy." Section 1542 of the California Civil Code provides:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

As indicated above, the record conclusively shows that Suckow at least "suspected" that he was being grievously damaged by appellees' claimed illegal attempts to monopolize the borax industry, even though he lacked conclusive evidentiary proof at that time of all the details of the conspiracy. Therefore, under the California statute cited above, the releases must be held to bar this action. Furthermore both sets of releases specifically included all claims "known or unknown." Under California law such a release is fully effective and does not fall within the scope of § 1542, supra. Berry v. Struble, 20 C.A. 2d 299, 66 P.2d 746.

We are not impressed with appellants' assertion that failure to include in the releases a specific

release of "anti-trust actions" shows bad faith on the part of appellees. We do, however, think it likely that had appellants intended to exclude this kind of a cause of action from the broad ambit of the releases (see footnotes 4 and 5) they would (in view of their oft-repeated prior accusations concerning appellees' unlawful attempts to destroy them and to throttle competition) have specifically excepted antitrust actions from the broad and all-inclusive terms of the general releases which they executed.

We hold that the releases were properly shown by appellees' affidavits and that they constituted a defense to this action which entitled the appellees named in the releases to judgment as a matter of law.

Appellees contend that the other appellees not named in the releases were likewise released from any claim of liability for participation in the alleged conspiracy, under the elementary principle that the release of one joint tort feasor releases all others. Appellants have presented no arguments or authorities to the contrary. However, we think it unnecessary to decide the validity of this contention for, in our opinion, the other affirmative defense—that of the California statute of limitations—fully justified the entry of judgment in favor of all appellees.

All parties agree that the three year statute of limitations found in § 338 (1) of the California Code of Civil Procedure ("actions on liabilities created by statute"; the text of the above code section is set out in our Burnham case, supra) applies to an

action of this character. However, their opinions differ as to the application of this statute to the facts of this case and on the effect of the Moratorium Act passed by Congress on October 10, 1942. We agree with appellants that this Act suspended, until June 30, 1946,[8] the running of the various statutes of limitations against all antitrust actions and proceedings, civil and criminal, which were not already barred when the Act was passed. However,

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[8]The Act of October 10, 1942, Ch. 589, 56 Stat. 781, provided:

"Sec. 1. The running of any existing statute of limitations applicable to violations of the antitrust laws of the United States, now indictable or subject to civil proceedings under any existing statutes, shall be suspended until June 30, 1945 * * *. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws.

"Sec. 2. This Act shall be in force and effect from and after the date of its passage."

By Act of June 30, 1945, Ch. 213, 59 Stat. 306, the period of moratorium was extended to June 30, 1946. Three district court decisions have come to our attention in which the question of whether the Act applies to actions brought by private litigants as well as to those brought by the Government was considered and answered in the affirmative. United West Coast Theatres Corp. v. South Side Theatres, 86 F. Supp. 109; Tiffin Building Corp. v. Balaban & Katz Corp., 87 F. Supp. 121; Russellville Canning Co. v. American Can Co., 87 F. Supp. 484. The judges in those cases decided that the ordinary meaning of the words "civil proceedings" includes private suits, and that the legislative history of the Act does not reveal a contrary legislative purpose or intent. We agree.

this interpretation does not aid appellants because in our view any cause of action in favor of appellants was barred by the above noted three year California statute of limitations at a time prior to the passage of the Federal Moratorium Act.

Appellants attempt to surmount the limitations obstacle by advancing the blunt proposition that in antitrust actions of the instant character the conspiracy is the gist or gravamen of the cause of action, and since this was a "continuing conspiracy," the California statute of limitations did not begin to run until the time the last conspiratorial "overt act" was committed, which "act" was asserted to be the 1942 agreement and sale.

This proposition was rejected by this court in Burnham Chemical Co. v. Borax Consolidated, supra. A civil cause of action under the Sherman Act arises at each time the plaintiff's interest is invaded to his damage, and the statute of limitations begins to run at that time. Momand v. Universal Film Exchange, 43 F. Supp. 996, 1006, affirmed 1 Cir., 172 F. 2d 37, 49, cert. denied 336 U.S. 967. See also Bluefields S. S. Co. v. United Fruit Co., 3 Cir., 243 Fed. 1, 20, appeal dismissed 248 U.S. 595, "The statute began to run when the cause of action arose, and the cause of action arose when the damage occurred." Cases relied upon by appellants in support of the theory that the statute does not start to run until the last overt act are criminal cases where the gravamen of the offense is the conspiracy. 15 U.S.C.A. § 1; United States v. Socony-Vacuum Oil Co., 310 U.S. 150. But private civil antitrust

actions are founded, not upon the mere existence of a conspiracy, but upon injuries which result from the commission of forbidden "overt acts" by the conspirators, 15 U.S.C.A. § 15; Foster and Kleiser v. Special Site Sign Co., 9 Cir., 85 F.2d 742, 751, and cases there cited.

Therefore, the only actions of the character here being considered which would not be barred by the noted California statute of limitations would be those arising from damages caused by illegal "overt acts" of appellees which occurred within the three year period immediately preceding October 10, 1942 (the date of the enactment of the Federal Moratorium Act, supra), or thereafter. The only acts which appellees contend were "overt acts" occurring during this particular period were the purchase of all of appellants' borax interests and the procurement of the releases, which transactions took place in December of 1942. As we said previously, we cannot understand how these actions can logically be said to be illegal "overt acts" committed by appellees to the damage of appellants. In exchange for the sale of their proprietary interests and for the execution of the 1942 release appellants received $350,000 in cash. The complaint does not charge that the 1942 sale and release was made under duress or compulsion or was other than a voluntary transaction.

It is true that the complaint does allege that appellants made the sale and executed the 1942 release as a result of past experience of harassment and persecution by appellees, and threats of a

renewal of similar activities in the future. However, appellants were not forced to sell. It cannot even be said that the "threats" rose to the level of economic coercion, for at the time of the 1942 transaction appellants were not even engaged in the borax business and had not been so engaged since 1934, which was thirteen years before this action was filed. Appellants' only remaining interest in the borax business (in 1942) was that of lessor of their one-half interest in the borax mine, and as such they were collecting royalties from appellee Pacific Coast on the borax as it was mined by this appellee-lessee. This lease had two years to run at the time of the 1942 sale.

The record induces the firm conviction that by the 1942 agreement and sale, the parties thereto were voluntarily wiping the slate completely clean of controversies by a full settlement of any and all existing differences between them. We are not aware of any principle of law which requires private monopolists to be treated in any different fashion than other tort feasors in the matter of entering into binding private settlement agreements arising out of demands against them for damages. Such settlements in no wise obstruct possible criminal prosecutions which might be instituted by the Government, nor do they defeat the Congressional purpose of allowing private claimants in this class of actions the right of redress of their grievances in our courts. We cannot and should not characterize the act of appellees in entering into a voluntary

"peace pact" with appellants as an illegal or "overt act." It may well be that if appellants had originally possessed all of the evidentiary proof which they now claim to have they would not have sold out or made the release agreements, but would have brought this action long ago.[9]

Appellants next contend that the California statute of limitations did not run against them because the existence of the so-called 1929 "General Conspiracy" was fraudulently concealed from them by appellees.[10] This argument possesses no greater

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[9]In this connection the record shows that in the bankruptcy proceedings in 1934, counsel for Suckow, after having repeatedly accused appellees of violalations of the antitrust laws, stated, "I claim that they are true and I claim that those allegations will be proved in the proper proceedings at the proper time."

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[10]The only allegation in the complaint on fraudulent concealment appears in Paragraph 91 where it is charged that "said 'General Conspiracy' was fraudulently concealed by said defendants from plaintiffs and each of them until the time of discovery thereof [1944] as aforesaid by plaintiffs." In the Burnham case, supra, the complaint averred that the plaintiffs had accused the defendants of wrongdoing and that the defendants had denied the accusation, and we there held the said averment to be insufficient. The complaint in this case does not even contain such an allegation of accusation and denial. A claim of fraudulent concealment made below by appellants (appearing in documents filed to oppose appellees' motions) was that certain appellees had denied that they were guilty of monopoly practices which violated the antitrust laws when so accused by appellants in certain litigation and hearings over 13 years before this suit was started.

In the Burnham case we held that a denial of an

validity than the contention (discussed and rejected above) that the conspiracy is the gist or gravamen of appellants' cause of action. The record before the trial court makes clear beyond dispute that at all times pertinent to this inquiry appellants knew and believed that they were being grievously damaged by Borax Ltd. and its subsidiaries and agents and were keenly aware that the acts of appellees had caused and were causing damages, and knew, or had reason to believe, and did believe, that these acts were committed in violation of Federal antitrust laws. Thus the ultimate and determinative facts constituting the legal basis of this action were known to appellants. This fact clearly appearing from all of the record before the trial court, the claimed ignorance of the existence of a formal conspiracy along with its exact date, precise terms, specific objectives and other evidentiary matter, would be immaterial so far as regards the question of the California statute of limitations, as would any alleged concealment thereof. Furthermore, appellants' bare allegation of "fraudulent concealment" is but a conclusion of law which falls far short of the particularity of statement required by Rule 9 (b). And the undisputed facts showing the

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accusation of wrongdoing (where such an answer was in practical effect no more than a failure to disclose the existence of a cause of action) was not a "fraudulent concealment," and therefore the statute of limitations was not suspended merely by reason of appellants' ignorance of or failure to "discover" the existence of the cause of action.

[Title of Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing 719 pages, numbered from and including 1 to and including 719, to be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the appellants, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 8th day of December, 1950.

[Seal] PAUL P. O'BRIEN,
Clerk.

Office-Supreme Court, U
FILED
JAN 22 1951
CHARLES ELMORE

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 509

SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation; MOJAVE BORAX COMPANY, LTD., a corporation; PAUL O. TOBELER, Executor of the Last Will and Testament of John K. Suckow, Deceased, and RUTH E. SUCKOW,

Petitioners,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY, AMERICAN POTASH & CHEMICAL CORPORATION, STAUFFER CHEMICAL COMPANY, WEST END CHEMICAL COMPANY, WESTERN BORAX COMPANY, LTD., GOLDFIELDS AMERICAN DEVELOPMENT COMPANY, PACIFIC ALKALI COMPANY, F. LESSER, JAMES M. GERSTLEY, FRANK M. JENIFER, P. C. BANKER, ALLEN W. ASHBURN, WALTER A. MOSES, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION as Executor of the Last Will and Testament of Clarence McAnisse Rasor, Deceased, BEN H. BROWN, as Special Administrator of the Estate of Victor C. Emden, Deceased, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. .....

SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation; MOJAVE BORAX COMPANY, LTD., a corporation; PAUL O. TOBELER, Executor of the Last Will and Testament of John K. Suckow, Deceased, and RUTH E. SUCKOW,

Petitioners,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY, AMERICAN POTASH & CHEMICAL CORPORATION, STAUFFER CHEMICAL COMPANY, WEST END CHEMICAL COMPANY, WESTERN BORAX COMPANY, LTD., GOLDFIELDS AMERICAN DEVELOPMENT COMPANY, PACIFIC ALKALI COMPANY, F. LESSER, JAMES M. GERSTLEY, FRANK M. JENIFER, P. C. BANKER, ALLEN W. ASHBURN, WALTER A. MOSES, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION as Executor of the Last Will and Testament of Clarence McAnisse Rasor, Deceased, BEN H. BROWN, as Special Administrator of the Estate of Victor C. Emden, Deceased, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners above named (plaintiffs below) hereby petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review the decision of such Court rendered on October 26, 1950, and which decision is set forth in Volume III accompanying this petition (R. page 690).

I.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under the provisions of 28 U.S.C. 1254 (1) and 15 U.S.C. Section 15, and also Sections 1 and 2.

II.

BASIS OF PETITIONERS' RIGHT TO CERTIORARI

Petitioners base their right to certiorari upon Rule 38 of the Rules of this Court, Subdivision 2 and Subdivision 5(b). Herein the Circuit Court of Appeals has rendered a decision

1. **In conflict with Rule 8e—Rules of Federal Procedure and with the decisions of other Circuit Courts on the question of the right of Defendants to urge the Statute of Limitations on a Motion to Dismiss and for Summary Judgment in a treble Damage Anti-Trust case.**
2. **Also, on the right to urge the question of Release on similar motions.**
3. **Deciding an important question of Federal law which has not been decided by this Court, but should be settled by this Court, namely, the right to urge the pleas of the Statute of Limitations and Release on a motion to dis-**

miss and for summary judgment, in the face of the direct provisions to the contrary laid down in Rules of Civil Procedure, Rule 8(c) providing:

> "Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense."

Also, as to when the Statute of Limitations begins to run in such a Civil action, whether from the date of each overt act or from the last overt act. Also, whether the Rule laid down by this Court in Fiswick v. United States, 329 U.S. 211, 67 S.Ct. 224, and Brown v. Elliott, 225 U.S. 392, 32 S.Ct. 812, to the effect that the Statute of Limitations in a case of a continuing conspiracy does not begin to run until the last overt act, is applicable to such a case as the present, namely, a continuing conspiracy in a treble damage anti-trust case.

4. The applicability to this action of the Moratorium Act of October 10, 1942, and extensions thereof tolling the Statute of Limitations in antitrust actions. Respondents contended that this Moratorium was not applicable to Civil actions by individuals but was restricted to government proceedings. The Circuit Court denied such contention against Respondents but then proceeded to take up the plea of the statute factually and decided that upon the facts the Moratorium was not applicable, thus usurping the right of the trial Court to hear evi-

dence, testimony and cross examination on the subject.

5. Involving the right of a trial Court to pass upon questions of fact on a motion to dismiss and for summary judgment; also the action of a trial Court in deciding questions of fact upon the complaint and affidavits presented by defendants, as well as counter affidavits of plaintiffs denying the allegations of defendants' affidavits, all contrary to decisions of this and other Federal Courts.
6. Various other points contrary to the rulings of this and other Circuit Courts and hereinafter set forth.

III.

SUMMARY STATEMENT OF THE MATTERS INVOLVED HEREIN

This is a treble damage anti-trust action. It involves the Borax industry—the discovery, development, production, manufacture, sale and distribution of its products. To the complaint asking damages for the violations of Sections 1 and 2 of U.S.C.A., T. 15, and based on Section 15 of such title, defendants filed various motions to dismiss upon the grounds of the Statute of Limitations, the execution of two releases given by petitioners (R. pages 260 and 263), and on various other grounds. Typical of such motions is that appearing in R. 452. Each motion to dismiss also carried a motion for summary judgment. All of such motions are based upon affidavits and other documents attached to and made a part of such motions. A typical instance of such motion for summary judgment appears in R. 457. These affidavits and documents filed by respondents were answered by certain affidavits filed on behalf of petitioners (R. 466-570), denying, in part, certain of the allegations contained in the affidavits filed by respondents, and likewise denying various statements

in the documents accompanying such motions of respondents; thus questions of fact at once arose on the motions to dismiss as well as those for summary judgment, and which questions of fact have been passed upon by both the District and Circuit courts below, as a reading of the opinion of the Circuit Court will show (R. 680). Such ruling is contrary to various decisions of this Court on similar situations and to those of different Circuit Courts. In addition, the lower Court permitted respondents to urge the question of the Statute of Limitations on the motions to dismiss, contrary to Federal Rules of Civil Procedure, Rule 8(c), and to the decisions of various Circuit Courts and many District Courts.

Likewise, the Ninth Circuit allowed respondents to plead and urge the two releases given by petitioners to respondents during the period of time referred to in the complaint. Such ruling was directly contrary to the provisions of such Rule 8(c), and to the holdings of various Circuit Courts on a like question.

Also, the Circuit Court refused to follow the rule of this Court as laid down in two cases; namely, that in a continuing conspiracy the statute of limitations does not begin to run until the performance of the last overt act performed pursuant to the conspiracy.

To offset the plea of the Statute of Limitations petitioners urged the Moratorium Act of October 1942 and the Extending Act of June 30, 1945. While admitting the applicability of such statutes to the present situations, the lower Court, in an endeavor to avoid the rule of such statute, found that there were no overt actions committed during the period in question, again passing upon questions of fact. We discuss the law on this point hereafter.

Petitioners claimed and urged that in anti-trust actions of this character the conspiracy is the gist or gravamen. The lower Court denied this assertion in the face of the decisions of this Court holding to the contrary.

In the present matter a series of different conspiracies arose out of the activities of defendants, particularly those of 1927 and 1929. Plaintiffs knew nothing of the 1929 conspiracy until shortly prior to the commencement of this action. **The conspiracy of '29 is designated in the complaint as the "General Conspiracy" (R. 36), and is the conspiracy upon which this action is based (Opinion Circuit Court R. 692; also 697).** In order to show knowledge by plaintiffs of the existence of the '29 conspiracy, the trial court permitted defendants to file and urge affidavits and accompanying documents setting forth statements made by representatives of plaintiffs as to the existence of a '27 conspiracy entirely different from that of '29. To such affidavits plaintiffs filed counter affidavits denying that the reference to conspiracies, referred to in defendants' affidavits, had reference to the '29 conspiracy and that when such statements alleged by defendants were made neither plaintiffs nor their representatives had any knowledge of the '29 conspiracy. **In short, plaintiffs elected to charge on one certain conspiracy—1929—and to defeat such claim the lower courts allowed defendants to urge defenses applicable only and solely to prior conspiracies upon which plaintiffs did not charge, thus substituting plaintiffs' cause of action without the consent of and against the will of plaintiffs. Furthermore, the lower courts permitted this to be done by motions and affidavits denied by plaintiffs, thus raising questions of fact which, as soon as appearing, should have sent the**

case to a trial after an answer had been filed and issues joined. The Circuit Court refused (R. 713) to follow the rule of this Court and other Circuit Courts that in such actions as the present the conspiracy is the gravamen of the action and not the overt acts which might be performed pursuant thereto (Authorities hereafter).

After the trial Court had granted the motions to dismiss, plaintiffs asked that the *order* of the Court be amended so as to permit plaintiffs *to make a motion* to file an amended complaint; *not a motion* to file an amended complaint, but a motion to amend the order to permit the filing of such motion to amend. The lower Court denied such motion and the Circuit Court affirmed in spite of the decisions of other Circuit Courts, to the effect that it is the just policy of the law to give every man his day in Court, and in the absence of a showing of injury to defendants such motions should be granted. The highly technical handling of this question by the Circuit Court (R. 718) and its ignoring of the rulings of this Court, warrants, we respectfully submit, action on the part of this Court, especially in view of the great importance of this case to plaintiffs and of the wrongs and damages suffered by them at the hands of defendants. The complaint sets forth the facts fully and describes the borax industry (R. 34), the 1929 agreement (R. 35-39), various overt acts (R. 53-75), the lack of knowledge by plaintiffs of the General Conspiracy (R. 75-77), and that the overt acts complained of were performed pursuant to the General Conspiracy (R. 77-8). The admissions made by defendants are set forth in our Opening Brief in the Circuit Court, p. 40, and to which reference is respectfully made.

We regret the length of this petition and brief but the

character of the proceedings and the many questions of law arising and passed upon by the Circuit Court requires more than a formal petition. We extend our apologies for such requirements.

ARGUMENT

I.

The Circuit Court Erred in Permitting the Plea of the Statute of Limitations on the Motions to Dismiss and for Summary Judgment.

A. RULE 8(c), RULES OF CIVIL PROCEDURE, DEFINITELY PROVIDES THAT A PLEA OF THE STATUTE OF LIMITATIONS, AMONG OTHERS, SHALL BE ADVANCED AFFIRMATIVELY. NO EXCEPTION IS MADE IN THE RULE AND THIS COURT, SO FAR AS WE HAVE BEEN ABLE TO DISCOVER, HAS NOT PASSED DIRECTLY UPON THE QUESTION OF WHETHER OR NOT SUCH PLEA IS PERMISSIBLE. THE RULES AS SET FORTH HAVE BEEN DEFINITELY APPROVED AND ADOPTED BY THIS COURT, AND THERE WOULD SEEM TO BE NO GROUNDS FOR QUALIFICATIONS OR EXCEPTIONS TO THEM BY THE LOWER COURTS.

However, we find that a diversity of rulings has developed, some of the Circuit Courts and District Courts holding that on a motion to dismiss the statute may be urged, while other courts hold directly to the contrary. The question presented is important and, we respectfully submit, is worthy of and requires the attention of this Court under the provisions of Supreme Court Rule 38, Subdivision (b), providing that where a Circuit Court of Appeals "has decided an important question of federal law which has not been, but should be, settled by this Court." An illustration of such diversity of opinion which has grown up among the lower Courts is demonstrated in a note in 173 A.L.R., 361, reference to which is hereby made. Therein is set forth notes of various decisions holding contradictorily on the question of whether the Statute of Limitations might be urged on a motion to

dismiss. An examination of such note will demonstrate the conflict of opinion which has arisen and the necessity of settling definitely the question presented. It is an important question, one constantly arising and one that requires a clearance by this Court so that all lower Courts may be governed thereby. It is well to remember that the Statute of Limitations is a personal plea, one resting in the option of the defendant with the possibility present that the same might be waived; such is doubtless the basis of Rule 8(c) and its definite statement as a Rule without exception or proviso. To allow the lower Courts to create exceptions and attach conditions to such Rule, based upon what they deem the demands of each particular case, will be to throw the whole question into a field of unnecessary uncertainty. By holding strictly to the Rule as written and promulgated by this Court would be to establish certainty without deprivation of the rights of any litigant, for he would still be permitted by an affirmative pleading to protect his interests.

Illustrative of some of the decisions holding that the plea of such statute *can not* be advanced on a motion to dismiss are the following:

In *Dirk Ter Haar v. Seaboard,* Etc., 1 F.R.D., p. 598 (S.D. Cal.), it is held:

> "The defenses of laches, stale demands and the statute of limitations may not be asserted by motion to dismiss, but should be set forth affirmatively in defendant's answer (Federal Rules of Civil Procedure 8(c), 12(b), 28 U.S.C.A. following section 723c. Patsavouras v. Garfield, D.C., 34 F. Supp. 406; Munzer v. Swedish American Line, D.C., 30 F. Supp. 789; Holmberg v. Hannaford, D.C., 28 F. Supp. 216; Raker

v. United States, D.C., 1 F.R.D. 432; Baker v. Sisk, D.C., 1 F.R.D. 232; Nordman v. Johnson City, D.C. 1 F.R.D. 51), and that same rule prevails as to the defense of pendency of another action. F.F.C.P. 12 (b); Sproul v. Gambone, D.C., 34 F. Supp. 441."

To the same effect is *Carlisle v. Kelly,* Etc., 72 Fed. Supp. 326 (D.C. E.D. Penn.), where the court stated (Subd. (1)):

"The first reason advanced by the defendant is that the plaintiff's claim is barred by the applicable statute of limitations, which it contends is the statute of limitations of the State of Delaware where the accident occurred. Under Rule 12(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, *the defense of statute limitations may not be raised by motion, but must be affirmatively pleaded.* Kraushaar v. Leschin, D.C. E.D. Pa., 4 F.R.D. 143; Massachusetts Bonding & Ins. Co. v. Darby, D.C. W.D. Mo., 59 F. Supp. 175. Therefore, I cannot consider the validity of this defense on the present motion."

Also, the following:

Van Sant v. American Express Company, 169 F.(2) 355, Subd. (25), (Pa);

Contra: *Anderson v. Linton,* 178 Fed.2d 310 (7th Cir.);

Albrect v. Indiana etc., 178 Fed.2d 577 (7th Cir.);

United States v. Earling, 39 F. Supp. 864, Subd. 16 (Wis.);

Patsavouras v. Garfield, 34 F. Supp. 406 (N.J.);

United States v. Arthur, 23 F. Supp. 537 at 539, Subd. (4), (N.Y.);

Wilson v. Seas Shipping Co., 78 F. Supp. 464, (Pa),

holds definitely that the plea of the Statute of Limitations on a motion to dismiss may *not* be urged; citing *Kranshaar v. Lesching,* 4 F.R.D. 143, and *Carlisle v. Kelly,* 72 F. Supp. 326.

Zimmerman v. Poindexter, 78 F. Supp. 420 (Hawaii).

In such case, both motions to dismiss and for summary judgment were based on the plea of the Statute of Limitations. The District Court held that as long as the motion for summary judgment called for a determination of a question of fact involving the tolling of the statute, the question of such statute could not be raised on a motion to dismiss. Such is the situation in the present case, but the Ninth Circuit in its Opinion (R. 704) held directly contrary to the foregoing authorities (except to those cited as contrary), stating—

> "Appellants contend that the affirmative defenses of release and statute of limitations cannot be raised on a motion to dismiss but must, according to the terms of Rules 8(c) and 12(b), be asserted in an answer. We do not agree. In the first place a complaint may properly be dismissed on motion for failure to state a claim when the allegations in the complaint affirmatively show that the complaint is barred by the applicable statute of limitations."

The opinion, however, after stating what the court believed to be the law, fails utterly to designate in what particular the complaint failed to state a claim. **As a matter of fact, the lower court did not base its decision on any such lack of necessary allegations in the complaint but upon facts presented by the affidavits and documents offered in support of the motions for summary judgment.** This is def-

initely shown by that part of the opinion (R. 705), reading as follows:

> "Secondly, affirmative defenses, even though not appearing on the face of the complaint, may be established upon motion to dismiss or for summary judgment when, by affidavits, depositions and admissions, a set of undisputed facts is revealed upon which the moving party is entitled to judgment as a matter of law. Clearly Rule 56 permits affirmative defenses to be raised in a motion for summary judgment."

Here, the facts alleged in the affidavits of defendants did not remain undisputed. They were all disputed (R. 466, 570, 602).[1] Also that portion appearing in the opinion (R. 706-707), viz.:

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(1) (R. 698) The decision refers to the affidavit of Judge Ashburn (698 and 9) introducing a copy of an affidavit by Dr. Suckow, in which the latter says that the sharp rise in the price of borax after December, 1929, "is directly due to some agreement between producers of *crude borax* and said Borax Consolidated, Ltd., and its said subsidiaries known aforesaid as the 'Borax Trust'." This is offered in support of defendants' contention that Suckow knew or had reason to believe he was dealing with a "Borax Trust" or monopoly. The fact is, that the B.C.L. and its subsidiaries, with the Western Borax Company, later absorbed by the B.C.L., *were the only producers of "crude borax"* at that time, other than the Suckow Company. Suckow could not have gone into court and charged them with being a monopoly in violation of the antitrust laws, because they in no sense had a monopoly. The American Potash & Chemical Company, the West End Chemical Company, etc., were producing large quantities of borax from the waters or "Lake Brine" of Searles Lake, a little later amounting to as much as 100,000 tons annually (R. 24)—not producing *crude borax,* however.

So far as Suckow knew, or any one else outside of their conspiracy knew, the Borax Consolidated group and the American Potash group were active competitors in the production and marketing of crude and refined borax. It was not until the Federal Government seized their records and brought to light the agreement between these two groups, and the other defendants herein, that the "General Conspiracy" to control the borax industry was revealed.

Also, see affidavit of Frank Buren (R. 570) denying any knowl-

"We note that appellees' motions were to dismiss the complaint, or in the alternative, for summary judgment. Although the trial court "dismissed the complaint," we shall, in light of the above discussion, treat this disposal as a summary judgment in favor of appellees. Kelly v. R. F. C., supra. The net effect was the same—an adjudication on the merits, Rule 41(b). We accordingly hold that the affirmative defenses of release and statute of limitations were properly raised and presented by the procedure employed by appellees."

The situation is as follows:

To the complaint, defendants filed various motions to dismiss and motions for summary judgment (R. 452). Supporting these motions there were also filed affidavits of various parties such as those appearing in R. 83, 100 and 106. Such affidavits also had attached to them copies of various documents, claiming to show that plaintiffs knew of and discussed the 1927 conspiracy and acts performed thereunder. **No reference whatsoever was made to the conspiracy of 1929 on which the complaint was based. In reply to these affidavits, plaintiffs filed affidavits (R. 570, 602) denying that any such facts or references to conspiracies and referred to in the affidavits of defendants had reference to the 1929 conspiracy upon which the complaint was**

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edge by Dr. Suckow of '29 General Conspiracy until after the government disclosed the same in 1944—long after the period referred to in Judge Ashburn's affidavit. Also, see further affidavit of Frank Buren (R. 602) denying that Dr. Suckow had definite knowledge or information that defendants were joined in a conspiracy to ruin him financially. These counter affidavits of Mr. Buren raised direct issues of fact which required that the Court should have at once denied the motions for summary judgment and sent the cause to trial on the facts.

Gartor v. Arkansas, etc., 321 U.S. 620, 64 S.Ct. 724.

based but wholly and solely to the conspiracy of 1927 and to overt acts performed thereunder. Thus there were immediately created questions of fact, namely, as to whether the allegations of plaintiffs' reply affidavits were correct, which at once required that the trial court immediately deny the motions to dismiss and send the cause to trial. Instead of so proceeding, however, the Court held the motions for argument passed upon the facts and ultimately granted the motions. Such proceedings were contrary to the well-established law of this Court, and of various other Circuit Courts, as shown by the following:

Sartor v. Arkansas Natural Gas Corporation, 321 U. S. 620, 64 S. Ct. 724. It is there held (at page 725):

> "Federal rule providing for summary judgment was not intended to cut off right of trial by jury where there are issues to try, and summary judgment should be granted only when moving party is entitled to judgment as a matter of law, the truth is quite clear and no genuine issue remains for trial. Federal Rules of Civil Procedure, rule 56, 28 U.S.C.A., following Section 723c."
>
> "The credibility of witnesses and weight to be given their testimony is for jury which may exercise its independent judgment even if such testimony is uncontradicted."

B. THE MOTIONS TO DISMISS ADMITTED ALL OF THE ALLEGATIONS OF THE COMPLAINT WELL PLEADED.

Purity Cheese Co. v. Frank Ryser Co., 153 F.(2), 88 (7th Cir.);

United States v. Frankfort, Etc., 324 U.S. 293, 65 S. Ct. 661;

Ansehl v. Puritan, Etc., 61 F.(2), 131 (8th Cir.);

Ledbetter v. Farmers, Etc., 142 F.(2) 147 (4th Cir.), (Cert. den., 323 U.S. 719);

Willson v. Graphol Products Co., 165 F.(2) 446.

C. FURTHERMORE, AFFIDAVITS FILED IN SUPPORT OF A MOTION TO DISMISS OR FOR SUMMARY JUDGMENT, CANNOT BE USED TO CONTRADICT THE ALLEGATIONS OF THE COMPLAINT.

Domestic & Foreign Commerce Corp. v. Littlejohn, (D.C. Cir.), 165 F.(2), 235, at 237;

Michel v. Meier, 8 F.R.D. 464;

Frederick Hart & Co. v. Recordgraph Corp., (Third Cir.), 169 F.(2), 580.

In such case the court stated (P. 581):

"We are of the opinion that the District Court erred. It is well-settled that on motions to dismiss and for summary judgment, *affidavits filed in their support may be considered for the purpose of ascertaining whether an issue of fact is presented, but they cannot be used as a basis for deciding the fact issue. An affidavit cannot be treated, for purposes of the motion to dismiss, as proof contradictory to well-pleaded facts in the complaint.* Farrall v. District of Columbia Amateur Athletic Union, 1946, 80 U.S. App. D.C. 396, 153 F.2d 647; United States v. Association of American Railroads, D.C. Neb. 1945, 4 F.R.D. 510; 2 Moore's Federal Practice (2nd ed. 1948) pages 2254, 2255."

In *Sprague v. Vogt* (8th Cir.), 150 F.(2) 795, at page 800, it is held:

"This court has stated the substance and purport and effect of Rule 56(c), F.R.C.P., in Walling v. Fairmont Creamery Co., 139 F.(2d) 318, 322, as follows:

'Rule 56(c) of the Rules of Civil Procedure provides that a summary judgment shall be granted "if the pleadings, depositions and admission on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." On a motion for a summary judgment the burden of establishing the non-existence of any genuine issue of fact is upon the moving party, all doubts are resolved against him, and his supporting affidavits and depositions, if any, are carefully scrutinized by the court. The object of the motion is to separate the formal from the substantial issues raised by the pleadings, and the court examines evidence on the motion, not to decide any issue of fact which may be presented, but to discover if any real issue exists. Toebelman, et al. v. Missouri-Kansas Pipe Line Co., 3 Cir., 130 F.2d 1016, 1018. When affidavits are offered in support of a motion for summary judgment, they must present admissible evidence, and must not only be made on the personal knowledge of the affiant, but must show the affiant possesses the knowledge asserted. When written documents are relied on, they must be exhibited in full. The statement of the substance of written instruments or of affiant's interpretation of them or of mere conclusions of law or restatements of allegations of the pleadings are not sufficient. Rule 56(e), Rules of Civil Procedure; 3 Moore's Federal Procedure under the New Rules, p. 3175, et seq. On an appeal from an order granting a defendant's motion for summary judgment the circuit court of appeals must give the plaintiff the benefit of every doubt. Ramsourer v. Midland Valley R.

Co., D.C. 44 F. Supp. 523, 526; Weisser et al. v. Mursan Shoe Corporation, et al., 2 Cir., 127 F.2d 344, 346 (145 A.L.R. 467); McElwain v. Wickwire-Spencer Steel Co., 2 Cir., 126 F.2d 210.'

The rule is so well stated in *Newark Evening News v. King Features,* 7 F.R.D., 645, that we quote subdivisions 1 and 2 of such Opinion, at pages 646 and 647. The Court stated:

"Rule 56 of the Rules of Civil Procedure, supra, does not vest in the court the jurisdiction to summarily try the factual issues on the pleadings and affidavits of the parties, but vests in the court the limited authority to enter summary judgment only if it clearly appears from the record that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' *The complete absence of any genuine issue of fact must be apparent and all doubts thereon must be resolved against the moving party.* Fishman v. Teter, 7 Cir., 133 F.2d 222; Toebelman v. Missouri-Kansas Pipe Line Co., 3 Cir., 130 F.2d 1016; McElwain v. Wickwire Spencer Steel Co., 2 Cir., 126 F.2d 210; Miller v. Miller, App. D.C., 122 F.2d 209; Whitaker v. Coleman, 5 Cir., 115 F.2d 305. See also Sarnoff v. Ciaglia, 165 F.2d 167, recently decided by the United States Circuit Court of Appeals for the Third Circuit. *If it appears from the record that there is a genuine issue of fact, even though it may relate only to the credibility and the weight of the testimony, the court is without jurisdiction to enter summary judgment.* Sartor v. Arkansas Gas Corporation, 321 U.S. 620, 64 S. Ct. 724, 88 L. Ed. 967; Arnstein v. Porter, 2 Cir., 154 F.2d 464."

In

Domestic & Foreign Commerce Corp. v. Littlejohn, 165 F.2d 235,

it was said (p. 237):

> "* * * The complaint was met only by a motion to dismiss supported by affidavits. It was at this stage of the contest that the lower court dismissed the complaint on the ground of lack of jurisdiction. *The allegation should have been treated as admitted and therefore the motion to dismiss could be properly granted only if it were clearly apparent to the court that the plaintiff (appellant here) would not be entitled to the relief sought under any state of facts which could be proved in support of the specific claim.* Tahir Erk v. Glenn L. Martin Co., 4 Cir., 116 F.2d 865. The summary nature of the hearing preceding dismissal precluded the careful consideration to which appellant was entitled."

Also see

Willson v. Graphol Products Co., 165 F.2d 446;

Ledbetter v. Farmers, Etc., 142 F.2d 147 (4th Cir.) Cert. denied; 323 U.S. 719.

In the *Leabetter* case it was held that under the Rules of Civil Procedure a motion to dismiss takes the place of the old demurrer and in considering the motion the Court must treat every properly pleaded allegation of fact in the complaint as true.

Also see *Ansehl v. Puritan,* Etc., 61 F.2d 131 (8th Cir.). At p. 133, Judge Sanborn states:

> "Since such a motion to dismiss has taken the place of a demurrer, it is elementary that it admits all

material facts well pleaded in the complaint, that only defenses in point of law appearing upon the face of the complaint may be considered, and that, unless it is clear that, taking the allegations to be true, no cause of action in equity is stated, the motion should be denied." (Citing cases).

In

United States v. Frankfort, Etc., 324 U.S. 293; 65 S.Ct. 661,

it is held that facts alleged in an indictment stand admitted on demurrer and on a plea of nolo contendere. Also see

U.S.C.A. T 28, p. 890, Note 475.

D. IT IS SUBMITTED THAT THE COMPLAINT IS SUFFICIENT AND WITHIN THE RULES LAID DOWN IN THE FOLLOWING CASES, TO WIT:

Stevens Co. v. Foster & Kleiser, Etc., 311 U.S. 255, 61 S. Ct. 210;

Publicity Building, Etc. v. Hannegan, 139 F.(2) 583 (Eighth Cir.);

United States v. Standard Oil, Etc., 7 F.R.D. 338 (S.D. Cal.).

The complaint is offered as a refutation of the claim that it does not state a cause of action. A reading of the same is necessary in order to understand the references made in the opinion of the lower Court, and by the authorities cited above the allegations of such complaint are admitted by the motions and cannot be denied or tried out by affidavits of the defendants. All of the allegations of such affidavits of defendants raise questions of fact which can only be passed upon at a regular trial and at which

witnesses appear and cross examination is possible. Among such questions of fact are the following: (a) whether or not appellants knew of the formation of such General Conspiracy prior to the action of the Government in 1944; (b) if so, when was such discovery made; (c) whether or not appellants would have entered into the agreement of August, 1934, or the sale of December, 1942, had they known the facts alleged; (d) whether or not appellants were damaged by the activities of appellees, as alleged in the complaint and admitted by appellees; (e) whether or not such General Conspiracy was a fraud upon appellants, as charged in paragraph 91 (R. 77); (f) whether or not such General Conspiracy was a continuing conspiracy, as alleged in paragraph 93 (R. 78) and admitted by appellees; (g) whether or not appellants were damaged in the manner and as a result of the activities of appellees and as alleged in paragraph 94 (R. 78); (h) and, whether or not appellants knew or became aware, prior to the fall of 1944, of the fact that appellees had become or were violators of the antitrust laws, and, if so, upon what date such discovery was made by appellants; (i) and, when or upon what date the Statute of Limitations began to run against appellants on this present complaint or the cause of action set forth therein. See last paragraph of the *Hart* case cited infra (169 F.(2) 580) and appearing on p. 583 and which is on all fours with the present case.

It does not rest in the jurisdiction of either the trial Court or the Appellate Court to pass upon such questions of fact, especially when they are so clearly brought to the front as they are in the present situation. We, therefore, respectfully submit that the question of the presentation of the Statute of Limitations on a motion to dismiss is

wide open in the Federal courts; that such question is one of extreme importance and interest and is one that should be settled by this Court. Also, the Opinion of the Ninth Circuit upholding its right as a trier of the facts presented by the Record on such motion is contrary to the rules of both this Court and of other Circuit Courts. Accordingly, Rule 38 of this Court becomes immediately applicable, and we respectfully submit that certiorari should be granted.

E. THE RELEASES. THE LAW AS TO SUCH IS THAT APPLICABLE TO THE STATUTE OF LIMITATIONS AND SET FORTH ABOVE. F.R.P. RULE 8(c) PROVIDES DIRECTLY AND UNQUALIFIEDLY THAT THE DEFENSE OF "RELEASE" MUST BE SET FORTH AFFIRMATIVELY. HERE, THE CIRCUIT COURT TREATED THIS QUESTION AS IT DID THAT OF THE STATUTE OF LIMITATIONS AND ALLOWED THE TRIAL COURT TO ATTACH PROVISOS AND CONDITIONS TO RULE 8(c). THE POWER OF THE LOWER COURT SO TO DO HAS NEVER BEEN PASSED UPON BY THIS COURT, ALTHOUGH VARIOUS OTHER CIRCUIT AS WELL AS DISTRICT COURTS HAVE HELD TO THE CONTRARY AND UPHELD THE RULE AS PROMULGATED BY THIS COURT. THEREFORE, SUPREME COURT RULE 38, SUBDIVISIONS 2 AND 5(b), IS APPLICABLE.

The Circuit Court in its decision (R. 709), re the releases says:

> " * * * the record shows that in exchange for the 1934 agreement and releases appellant received $150,000 in cash and the satisfaction or release of various judgments and claims against them which amounted to about $500,000."

This is an erroneous statement of the real facts in the case. The $150,000 was in no sense a consideration for that release, but merely the price which had been agreed upon which Borax Consolidated, Ltd., should pay for certain potential and prospective borax lands owned by the

Suckows, outside the Suckow corporation, and which Borax Consolidated, Ltd., agreed to purchase in connection with the said settlement. This consisted of approximately 280 acres of potential borax bearing land immediately adjoining on the north the land where the Suckow mine was situated (in Section 14); certain undivided interests in other lands in Sec. 27, same township, and several mining claims in the vicinity (R. 308-315, Affidavit of Moses Lasky, Ex. 11).

The "various judgments and claims" amounting to about $500,000. were made up as follows: $310,000. claim filed by Pacific Coast Borax Company in the bankruptcy proceeding for ore removed from the joint property by Suckow—16291.5 long tons; $140,000. claim of the Gembo concern, with which Suckow had a marketing contract, and which later became the agent of the B.C.L., and $50,000. claimed by the Trustee in bankruptcy for funds received by Suckow in operation of the mine while the bankruptcy proceeding was being tried and before the Trustee was appointed.

The first of these items, based upon a valuation of the ore at about $20 a ton, that being the value claimed for it by B.C.L., was so absurd that even the Referee in Bankruptcy rejected it. Later this ore was returned to B.C.L. under the terms of the lease (R. 331). The Gembo claim was a trumped up affair, instigated by B.C.L., after the bankruptcy case had been started, and had never been heard of by Suckow prior to that time. The other was money received from operations and expended legitimately in carrying on the business of the company before the Trustee assumed control. All were pending on appeal,

and their dismissal in the settlement of 1934 represented no actual money consideration or loss to B.C.L.

(R. 710) The said decision further states (R. 709-710), that "The complaint itself shows that in exchange for the 1942 sale and release executed by plaintiffs they received $350,000 in cash. We think that the trial court was entirely justified in finding that, 'In every transaction with the defendants the plaintiffs have received consideration or an adjudication of their rights by a court having jurisdiction'."

Such is also an erroneous finding in that it does not appear that the trial court made any effort to ascertain the actual value of the property sold for $350,000. The fact is they found in the bankruptcy hearing that there was a body of proven borax ore on only 15 acres of the joint property amounting to 1,077,000 tons (R. 224). There were 240 acres of borax land involved, and the limits of the ore body had not been found in any direction (R. 225). In the bankruptcy hearing the ore was found to be worth $2.50 a ton. In the lease made with the 1934 settlement, the ore was paid for at the rate of $1.25 to $2.50 a ton, according to the quantity removed in a given time. On this basis, the over one million tons of ore in the 15 acres then developed was worth $1,250,000. to $2,500,000. It is a fair conclusion that the ore in the remaining 225 acres was worth several times that amount.

Furthermore, neither the 1934 settlement, nor the 1942 sale, was a voluntary transaction on the part of the Suckow interests. The former was made under the compulsion of financial necessity (R. 606-610). The latter under threats of refusal to turn the property back at the

expiration of the lease and before they had any knowledge, or even suspicion, of the 1929 conspiracy.

See, Jack, etc. v. Associates, etc. 125 Fed. (2) 778 (3rd Cir.), where it was held (Sub. 14) that in an action on contract, release is new matter constituting a defense and, if relied upon, must be specially pleaded. Citing Rule 8(e).

Note: Directly contrary to the ruling of the Ninth Circuit thereby making Sup. Ct. Rule 38—Subs. 2 and 5(b) applicable.

In addition to allowing the plea of "release" as a matter of law (Opinion R. 705), the Circuit Court held that the trial Court could accept and pass upon affidavits filed by defendants raising questions of fact as to the validity of such releases, their purpose and extent as well as the fairness of the consideration involved therein, thus allowing defendants to **try out questions of fact without an actual trial (Opinion R. 709-711)**. For the reasons advanced hereinabove on the question of the Statute of Limitations, we respectfully submit that the Circuit Court erred grievously in allowing the Releases urged herein on the motions to dismiss. Such would mean the turning of every motion for summary judgment into a trial of fact.

F. THE CONSPIRACY IS THE GRAVAMEN OF A TREBLE DAMAGE ACTION SUCH AS THE PRESENT AND WE RESPECTFULLY SUBMIT THAT THE STATEMENTS IN THE OPINION BELOW ON PAGE 713 TO THE CONTRARY ARE ERRONEOUS; THE TRUE RULE IS THAT THE CONSPIRACY IS THE BASIS OF THE ACTION AND SO FAR AS THE STATUTE OF LIMITATIONS IS CONCERNED IT DOES NOT BEGIN TO RUN UNTIL THE PERFORMANCE OF THE LAST OVERT ACT PERFORMED PURSUANT TO THE CONSPIRACY. SUCH IS THE RULE ANNOUNCED BY THIS COURT BUT OVER THE YEARS SOME OF THE LOWER COURTS HAVE DRIFTED INTO THE OVERT ACT THEORY TO THE CONFUSION THAT IS NOW PRESENT. IT IS, WE RESPECTFULLY SUBMIT, NOW FOR THE SUPREME COURT TO TAKE OVER THIS CASE AND STRAIGHTEN OUT SUCH CONFUSION AND DEFINITELY ESTABLISH AGAIN THE LAW.

The reference in the opinion (R. 713) to the *Burnham* case and the rejection by this Court in such case of the point under discussion here is erroneous. This Court did not take over the *Burnham* case and did not pass upon this point.

Both Sections 1 and 2 of the Anti-trust Act (U.S.C.A. T. 15 Sections 1 and 2) make "conspiracy" the cause of action, not the overt acts pursuant to such conspiracy. The Circuit Court has failed to make this distinction which in turn has led to the error in measuring the commencement of the running of the Statute of Limitations in such proceedings. It is not the wrongful acts performed pursuant to the conspiracy that constitute the cause of action but the "conspiracy" that is the Gravamen. See Opinion (R. 713), where it is stated:

> "A civil cause of action under the Sherman Act arises at each time the plaintiff's interest is invaded to his damage, and the statute of limitations begins to run at that time." Citing cases;

Such is an erroneous statement of the law **for Sections 1 and 2 specifically make "conspiracies" the basis of a plain-**

tiff's rights. Whether or not actual damage follows the conspiracies is another question but the wrong and the cause of action comes into being as soon as the conspiracy is formed. If plaintiffs cannot prove damages resulting from the conspiracy they cannot of course recover from the mere act of conspiring, but the inability to prove damages does not change the gravamen of such a proceeding from the conspiracy to the overt acts. It is another illustration of damnum absque injuria.

This Court has definitely laid down the rule that the conspiracy is the gravamen of the action and not the overt act. See

Nash v. United States, 229 U.S. 373; 33 S. Ct. 780,

where it was held:

> "No overt act need be alleged in an indictment charging a conspiracy to restrain or monopolize interstate trade or commerce, under the antitrust act of July 2, 1890, since that statute does not make the doing of any act other than the act of conspiring a condition of liability."

Also see

United States v. Socony, Etc., 310 U.S. 150; 60 S. Ct. 811, where it was held:

> "Proof that there was a conspiracy, that its purpose was to raise prices, and that it caused or contributed to a price rise, is proof of the actual consummation or execution of an unlawful conspiracy in restraint of trade and commerce. Sherman Anti-Trust Act, Sec. 1, 15 U.S.C.A. Sec. 1."

See the discussion on this point on p. 219 of the Official Report.

Likewise, see *United States v. New York, Etc.* (5 Cir.), 137 F.2d 459; (Cert. denied, 320 U.S. 783); at p. 463 the Court said:

"* * * Nash v. United States, 229 U.S. 373, 33 S. Ct. 780, 57 L. Ed. 1232, and United States v. Socony Vacuum Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129, settle it that the offense of conspiracy under the Sherman Act is complete when the agreement or conspiracy is formed, that jurisdiction and venue lie in the district where it was formed, and that it is not necessary to allege the commission of an overt act. It is settled, too, that a conspiracy in restraint of trade is, or may be, a continuing offense, United States v. Kissel, 218 U.S. 601, 31 S. Ct. 124, 54 L. Ed. 1168, and that 'A conspiracy thus continued in effect renewed during each day of its continuance,' United States v. Borden Co., 308 U.S. 188, 60 S. Ct. 182, 190, 84 L. Ed. 181. As each new member later joins the conspiracy, he in effect makes the agreement then and there to become a party to it."

Also, on p. 464 the Court said:

"* * * It is not the form of the combination or the particular means used, but the result to be achieved that the statute condemns. **It is equally clear that it is of no importance whether the means used to accomplish the unlawful objective are in themselves unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts, yet if they are a part of the sum of the acts which are relied upon to effectuate the conspiracy the Sherman Act forbids, they fall within the condemnation of the statute."**

In

United States v. General Motors, Etc., 121 F.2d, it was said (pp. 404 and 405):

"* * * proof of the conspiracy would have been sufficient to sustain a conviction even if the conspiracy had never been carried out. This is true because the offense condemned by the Sherman law is the act of conspiring, and neither actual restraints nor overt acts need be proved. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 252, 60 S. Ct. 811, 84 L. Ed. 1129."

Also see

United States v. Armour (10 Cir.), 137 F.2d, at p. 271.

While the foregoing are criminal cases (which we submit are no different, so far as the rule in question is concerned, from civil actions), the same rule is applied in civil actions for treble damages.

See

Albert Pick-Barth Co. v. Mitchell, Etc., 57 F.2d 96 (Cert. denied, 286 U.S. 552; 52 S.Ct. 503), which was a civil action for treble damages. On p. 102 the Court stated:

"To constitute an offense under section 1 of the Sherman Act, it is not necessary, if a conspiracy is proven, the purpose and intent of which was to eliminate by unfair means a competitor in interstate trade, to show that the public was affected, and to what extent. Nor is it necessary under this act, as it is at common law, to prove any overt acts in order to constitute the offense defined in section 1; but if overt acts are proved in furtherance of the offense defined in section 1, and any one is thereby injured in his business or property, the conspirators under section 7 of the Act are liable therefor."

The Pick-Barth case cites:

> *Chattanooga Foundry, Etc., v. Atlanta,* 203 U.S. 390; 27 S. Ct. 65,

which was also a civil action and which holds that Congress "had power to give an action for damages to an individual who suffers by breach of the law."

G. THE HOLDINGS OF THE CIRCUIT COURT (R. 713) THAT "A CIVIL CAUSE OF ACTION UNDER THE SHERMAN ACT ARISES AT EACH TIME THE PLAINTIFF'S INTEREST IS INVADED TO HIS DAMAGE, AND THE STATUTE OF LIMITATIONS BEGINS TO RUN AT THAT TIME"; AND ALSO, "THE STATUTE BEGAN TO RUN WHEN THE CAUSE OF ACTION AROSE, AND THE CAUSE OF ACTION AROSE WHEN THE DAMAGE OCCURRED," ARE DIRECTLY CONTRARY TO DECISIONS SQUARELY ON THE POINT AND MADE BY THIS COURT.

In *Fiswick v. United States,* 329 U.S. 211; 67 S.Ct. 224 (P. 216 of the Official Report), it is held:

> "The statute of limitations, unless suspended, **runs from the last overt act during the existence of the conspiracy.** Brown v. Elliott, 225 U.S. 392, 401, 32 S.Ct. 812, 815, 56 L.ed. 1136. The overt acts averred and proved may thus mark the duration, as well as the scope, of the conspiracy."

The *Fiswick* case cites

> *Brown v. Elliott,* 225 U.S. 392; 32 S.Ct. 812.

On p. 815 of the Supreme Court Rep. the Court said:

> "In Lonebaugh v. United States, 103 C.C.A. 56, 179 Fed. 476, the circuit court of appeals of the eighth circuit considered the relation of the overt acts to the conspiracy and their effect in determining the application of the statute of limitations. The court said, by Mr. Justice Van Devanter, then circuit judge: **'While the gravamen of the offense is the conspiracy,** the

terms of sec. 5440 (U.S. Comp. Stat. 1901, p. 3676), are such that there also must be an overt act to make the offense complete (Hyde v. Shine, 199 U.S. 62, 76, 50 L.ed. 90, 94, 25 Sup. Ct. Rep 760); and so the period of limitations must be computed from the date of the overt act rather than the formation of the conspiracy. And where, during the existence of the conspiracy there are successive overt acts, **the period of limitation must be computed from the date of the last of them of which there is an appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found.** (Citing cases)'."

The Circuit Court attempts to escape these decisions by the claim that they refer to criminal proceedings where the "gravamen of the offense is the conspiracy." We submit that there is and should be no distinction between civil and criminal cases in this question and this Court never has made any such distinction. We submit that if in criminal cases the gravamen of the offense is the conspiracy, as held by the Circuit Court (R. 713), there is no reason why such rule should not also be applied in civil actions, as we have shown above; the provisions of the law, Sections 1 and 2, T. 15, make no such distinction and neither does this Court. Accordingly, we respectfully submit that this particular question, due to its importance and due to the confusing situation arising from the decisions of the various Circuit and District courts, should be definitely settled and decided by this Court. We also submit that the case of *Albert Pick-Barth Co. v. Mitchell*, 57 F.(2) 96 (and in which this Court denied certiorari—286 U.S. 552), states the correct rule in civil actions for

treble damages. This case is cited and commented upon in the preceding subdivisions. Such action was a civil action and directly contrary to the ruling made by the Ninth Circuit.

As stated, the decisions on this particular question as to when the statute commences to run are greatly confused and need the definite pronouncement of this Court. These treble damage actions are constantly increasing in number and the importance of the Statute of Limitations is constantly growing, but as the state of the law now exists no one in the profession can tell just how to advise as to this very important point.

H. THE CONSPIRACY OF 1929, CHARGED IN THE COMPLAINT, WAS A CONTINUING CONSPIRACY, AND THE STATUTE OF LIMITATIONS DID NOT COMMENCE TO RUN UNTIL THE COMPLETION OF THE LAST OVERT ACT PERFORMED PURSUANT TO SUCH CONSPIRACY, AND WHICH WAS THE SETTLEMENT AGREEMENT OF DECEMBER 1942. THE CIRCUIT COURT COMPLETELY IGNORED THIS POINT IN ITS OPINION ALTHOUGH REFERRING TO IT AS URGED BY PLAINTIFFS (R. 697).

Such rule has definitely been laid down by this Court, as well as various Circuit Courts, but the lower Court refused to follow such ruling, thus ignoring completely the following authorities: **There is no distinction between civil and criminal cases for neither the law itself nor this Court has established any such distinction.**

See—*United States v. Kissel,* 218 U.S. 601, L.Ed. 1168. This was an antitrust case and is controlling in appellant's favor. There it was held:

> "2. A conspiracy to restrain or monopolize trade, in violations of the Sherman Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U.S. Comp. Stat. 1901, p. 3200), by obtaining control of a competitor through a pledge of the majority of its stock to secure a loan

to a stockholder, and then voting to suspend business until further order of the board of directors, **continues, so far as the statute of limitations is concerned, so long as any further action is taken in furtherance of the conspiracy."**

The true rule was set forth by Justice Holmes on page 607, where he states:

"The argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfied the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. United States v. Irving, 98 U.S. 450, 25 L.Ed. 193, 3 Am. Crim. Rep. 334. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan, the conspiracy continues up to the time of abandonment or success. A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an

agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract, but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act."

Also see page 610, where the Court further stated:

"To sum up and repeat: The indictment charges a continuing conspiracy. Whether it does so with technical sufficiency is not before us. All that we decide is that a conspiracy may have continuance in time, and that where, as here, the indictment, consistently with the other facts, alleges that it did so continue to the date of filing, that allegation must be denied under the general issue, and not by a special plea. Under the general issue all defenses, including the defense that the conspiracy was ended by success, abandonment, or otherwise, more than three years before July 1, 1909, will be open and unaffected by what we now decide."

In the case of *Brown v. Elliott*, 225 U.S. 392, 32 S.Ct. 812 at p. 819, the following statement there made is most applicable to the present situation. There it was said, in part:

"Where, during the existence of the conspiracy, there are successive overt acts, **the period of limitation must be computed from the date of the last of them of which there is an appropriate allegation and**

proof, and this, although the earlier acts may have occurred more than three years before the indictment was found."

In the following cases similar statements were made:

Braverman v. United States, 125 Fed.2d 283, at 287:

"A conspiracy continues insofar as the statute of limitations is concerned, so long as there is a course of conduct in violation of law to effectuate its purpose."

Hedderly v. United States, 193 Fed. 561 (Ninth Circuit); at page 569:

"Where the conspiracy contemplates various overt acts and the consequent continuance of the conspiracy beyond the commission of the first act, each overt act thereafter gives a new, separate, and distinct effect to the conspiracy, and constitutes another agreement, **so that a prosecution is not barred by the statute of limitations until three years after the commission of the last overt act alleged and proved."**

United States v. McWilliams, 54 Fed. Supp. 791, at page 794:

"The indictment clearly charges a continuing conspiracy. * * * True enough it is well settled that as to conspiracies under 18 U.S.C.A., Sec. 88, which do not become crimes until an overt act has occurred, the statute of limitations starts to run from the date of the last overt act, each succeeding overt act, if more than one, being considered the consummation of a new or revived conspiracy."

Here, the complaint shows the formation of a conspiracy and the continuing activities of the defendants thereunder. The charge of a continuing conspiracy is set forth in

Paragraph 92 (R. 77) and 93 (R. 78), the latter paragraph making the charge that each separate thing and act alleged and performed by the defendants has been and was an act, thing, or combination contributing to and forming a part of an overt act of such continuing conspiracy. The overt acts are set forth throughout the complaint, particularly beginning with Paragraph 83 (R. 53). From then on the complaint has to do with the activities of defendants against plaintiffs setting forth a statement or such activities and the various injuries inflicted by defendants upon plaintiffs as a result of defendants' violations of the antitrust act. In Paragraph 92 (R. 77), it is charged that all of these acts were performed pursuant to and in furtherance of the general conspiracy of 1929.

For a further discussion of this subject, see our Opening Brief in the Circuit Court, pages 63 to 67.

I. AS TO THE MORATORIUM ACT: WHILE HOLDING SUCH ACT APPLICABLE TO THE PRESENT FACTS (OPINION; R. 712-716), THE NINTH CIRCUIT HELD THAT THERE WERE NO OVERT ACTS COMMITTED DURING THE THREE YEARS PRECEDING THE COMMENCEMENT OF THE ACTION AND IN SO DOING TURNED ITSELF INTO A COURT TRYING FACTS INSTEAD OF PASSING UPON QUESTIONS OF LAW.

A mere reading of the opinion below shows the error into which the lower Court crept. As we have shown above, such Court on such motions as are here presented has no right to try facts or to pass upon the adequacy of compensations paid for the releases; such would be to take over the whole case on the facts. Also, the Court failed (R. 714)[1] to consider the overt acts alleged to have

(1) Such overt acts are, in part, set forth in the complaint, Paragraphs 85 to 88, inclusive, R. 69-75, inclusive. Subdivision (e) of Par. 88 summarizes generally the overt acts performed during such period, among which were threats of defendants that the lease

been committed by defendants during the period in question, the most prominent of which was the constant pressure upon plaintiffs to force them out of business. In such a situation no particular fact can be definitely asserted as an overt act of the conspiracy. The situation is exactly similar to that presented in the case of *Yurie v. Thompson,* 337 U.S. 163; 69 S.Ct. 1018. Such case involved a determination of when the statute of limitations began in a situation involving an occupational disease and the facts are comparable to those present in that the pressure of the wrongful acts is constant. Such pressure is one constant overt act and continues until either plaintiffs are put out of business or the conspiracy abandoned. A similar situation also developed in the case of *Nye & Nissen v. United States,* 168 F.(2) 842, in which certiorari was granted. That was a case from this Ninth Circuit. Again we submit that the lower Court erred in failing to follow the decisions of this Court and of other jurisdictions that on motions to dismiss the court is without jurisdiction to pass upon questions of fact. In addi-

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then in existence and held by certain of the defendants would be cancelled and returned to plaintiffs lessors, which would have resulted in great damage to lessors; lessees operated the mine covered by such lease in an improper, inefficient and incompetent manner, with the result that in 1937 a cave-in occurred with large damage to the property, and which was brought about by the improper methods by which the lessees operated the property; constant endeavors of the lessee and its attorneys to force the lessor plaintiffs to agree to the execution of a new and substituted lease or to sell all of their interests to the lessees; threatening to exhaust the property and claim the proceeds as prepaid royalty; using the mining shaft on the property for the operation of lessee's adjoining and separate property; making various other threats as to the operation and management of the property and to defeat the rights of plaintiffs lessors in said lease; further damaging the property by inefficient operations and various other activities as alleged in the complaint. No reference of any kind was made by the lower court in its opinion as to any of such overt acts.

tion, the facts of this case show constant overt acts during the three years under consideration. Its ignoring the actual and stated facts and overt acts constitutes a finding of fact in itself which it is without jurisdiction to make.

J. THE REFUSAL OF THE NINTH CIRCUIT TO ALLOW PLAINTIFFS TO MOVE FOR AN AMENDMENT TO THE ORDER DISMISSING WAS CONTRARY TO THE RULES OF CIVIL PROCEDURE, RULE 15, AND DECISIONS OF VARIOUS OTHER CIRCUIT COURTS.

In addition, the lower court (R. 718) does not correctly state the facts. There such Court claimed that **even though the motion was to amend the order so as to permit the filing of a motion to amend the order**, the same rules are applicable thereto as apply to direct motions to amend the complaint. Here, we did not ask to amend the complaint; rather we asked to amend the **order** of dismissal to permit us to file a motion for an amendment. Such an order was necessary before plaintiffs could file a motion to amend; after the granting of the same the requirements referred to in the Opinion (R. 718) would be applicable. The present situation is parallel to that cited in *Market v. Swift,* 173 F.(2d) 517 (2nd Cir.) wherein the court states on page 519 "technically, the judgment of dismissal should be re-opened before an amendment to the complaint is granted. Such relief can be sought within ten (10) days under Federal Rules of Civil Procedure, Rule 59, 28 U.S.C.A.. and then the running of the appeal time F.R. 73(a) is automatically suspended." By reason thereof, all that is said by the Ninth Circuit as to the failure to submit a suggested amendment falls of its own weight.

It has been the general practice of Federal Courts for years to give plaintiffs every opportunity to state properly a cause of action, and the fact that plaintiffs may have

previously filed two short amendments to the complaint, one as a matter of right and another by permission of the court not objected to by counsel, is immaterial as against the present facts.

This cause is of great importance to plaintiffs and we respectfully submit that if there were any deficiencies in the complaint in the manner referred to by the lower court plaintiffs should have been given the right to present at least their suggested amendments; it was an abuse of discretion to refuse to amend its order to such extent. No reason of any kind was given as to why this customary right was denied plaintiffs. No injury or injustice would have been suffered by defendants thereby. Such refusal is so far afield from the usual and general practice as to call for relief from this Court for the opinion of the lower Court is directly contrary to the rule laid down in *Market v. Swift,* supra, thus making the Supreme Court Rule 38 applicable.

CONCLUSION

In conclusion, we respectfully submit that it would be difficult to find an opinion of a Circuit Court more directly contrary to various rules and decisions of this and other Circuit Courts than is presented herein. The Ninth Circuit ignores rules established and approved by this Court as well as the decisions of both this and other Circuit courts on questions of great importance involving the anti-trust laws, thus, not only working a grave injustice upon plaintiffs in this particular situation, but adding to the confusion of the law on such points as are involved herein. We respectfully submit that Rule 38 of this Court is applicable and that certiorari should be granted.

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